

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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MICROSOFT CORPORATION, )  
 )  
Plaintiff, ) C10-1823JLR  
 )  
v. ) August 23, 2013  
 )  
MOTOROLA, INC., et al., ) TELEPHONIC  
 ) HEARING  
Defendant. )  
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BEFORE THE HONORABLE JAMES L. ROBART  
UNITED STATES DISTRICT JUDGE

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**APPEARANCES:**

**For the Plaintiff:** Arthur Harrigan, Christopher  
Wion, David Pritikin, Richard  
Cederroth, Andy Culbert and  
Ellen Robbins

**For the Defendants:** Ralph Palumbo, William Price,  
Brian Cannon, Kathleen Sullivan  
and Phillip McCune

1 THE COURT: Good afternoon.

2 MR. PALUMBO: Good afternoon, your Honor.

3 THE COURT: May I have a list of who is going to  
4 be speaking for the parties? And I would like to limit it  
5 to one or two to each side, please.

6 MR. HARRIGAN: Your Honor, Art Harrigan. I will  
7 be the primary speaker for Microsoft. If possible,  
8 Ms. Robbins may chime in at some point.

9 MR. PALUMBO: Your Honor, Ralph Palumbo. I have  
10 with me here Mr. Price, Ms. Sullivan, Ms. Roberts,  
11 Mr. Cannon and Mr. McCune, all of whom you've met, and  
12 Mr. Elihu of Quinn Emanuel, who I believe you have not  
13 met. The people speaking today, principally, will be  
14 Mr. Price, Ms. Sullivan and Mr. Cannon.

15 MR. HARRIGAN: Your Honor, just to complete the  
16 introductions, I am here with Mr. Pritikin, Mr. Cederroth,  
17 Mr. Wion, Mr. Cramer, and I believe Mr. Culbert from  
18 Microsoft is also on the phone.

19 THE COURT: All right. Well, counsel, to the  
20 extent that various people speak, I will ask you to  
21 identify yourself before you start in. There is a  
22 reporter back in Seattle who will be taking all of this  
23 down, and he may not be as familiar with the voices as I  
24 am.

25 So we have a not unlimited amount of time here, so I'm

1 just going to plunge right in. The first topic that I  
2 would like to take up is exceptions to the preliminary  
3 jury instructions. I do this so we can save a little bit  
4 of time on Monday.

5 I will start with the plaintiff. Mr. Harrigan, does  
6 Microsoft have any objections to the court's preliminary  
7 jury instructions?

8 MR. HARRIGAN: Your Honor, we have a few  
9 suggestions. Shall I just go through each one, or do you  
10 want to deal with them one at a time?

11 THE COURT: If we are going to deal with them,  
12 just do them all together.

13 MR. HARRIGAN: The first one has to do with  
14 references to the hypothetical negotiations, which are at  
15 Page 12, Line 6, and then down again at Line 16. Our  
16 thought about that subject is that the concept of putting  
17 a hypothetical negotiation in front of the jury has the  
18 potential to be confusing. And we have two alternate  
19 suggestions: One is to remove Lines 7 and 8, and parts of  
20 Lines 15 and 16, where the hypothetical negotiation is  
21 referred to, and simply start, "A RAND royalty rate is,"  
22 and then, "I have concluded in a previous trial that the  
23 RAND royalty rate 802.11 would have been." That's the  
24 approach we think is preferable.

25 The alternative approach, we think, is to leave it as

1 it is, but explain the role of the hypothetical  
2 negotiation. Because, given the issue in this case  
3 that Motorola -- I mean, that Motorola's approach to this  
4 case is, well, this all should have been a negotiation and  
5 the letters are beside the point, we are concerned about  
6 jury confusion.

7 So if there is going to be a reference to it, we would  
8 request that the court explain that this was a method that  
9 the court used to arrive at the rate, it is not something  
10 that the court is saying the parties would have been doing  
11 or should have been doing.

12 THE COURT: All right. Mr. Harrigan, I am going  
13 to ask you, if you have proposed alternatives, to get  
14 those to us before the close of business today. I would  
15 make the same request of Motorola.

16 MR. HARRIGAN: The second one has to do with two  
17 statements that the court made with regard to the breach.  
18 And I'm going to start with the statement that the court  
19 made at Page 13, Line 9 -- excuse me, Line 7, where you  
20 say, "During the prior trial I did not examine whether  
21 Motorola breached its commitments to provide Microsoft a  
22 license to its standards-essential patents on RAND terms,  
23 and I did not examine whether Motorola acted in good faith  
24 with respect to those commitments." We have no problem  
25 with that statement. I am merely pointing out that you

1 are describing two separate breach theories there, and  
2 stating that you didn't decide either one.

3 Contrasting that with Page 5, Line 20, "The issue in  
4 this case is breach of contract. Microsoft claims that  
5 Motorola breached the IEEE and ITU contracts by violating  
6 the covenant of good faith and fair dealing that is  
7 implied in those contracts. Specifically, Microsoft  
8 alleges that Motorola breached its duty of good faith and  
9 fair dealing under the IEEE contracts by the following  
10 actions."

11 So we would request that in both -- In this section  
12 you also acknowledge that the claim of breach is a  
13 flat-out breach of the RAND contract obligation, which is  
14 potentially separate from the other breach, which is the  
15 breach of the covenant of good faith and fair dealing.

16 THE COURT: All right. Any other comments?

17 MR. HARRIGAN: Yes. On Page 11, we think there is  
18 a potential -- there is some potential confusion in the  
19 Microsoft products section, Lines 10 to 14. "The primary  
20 Microsoft products at issue in this case that use the  
21 H.264 standard are Windows and Xbox. Windows is an  
22 operating system for computers, Xbox is historically a  
23 video game player, but now also plays video from," and you  
24 mention "Hulu, Netflix and DVDs." And it seems to imply  
25 that H.264 would be used in those products, but in fact

1 the court has found essentially that that is not the case.  
2 And I can cite the findings. That is Findings 291, 266  
3 and 292, where the court said, for example, "that DVDs use  
4 MPEG 2 and not H.264." We would request that that  
5 language be either eliminated or revised in some form so  
6 as not to create the impression that H.264 is in those  
7 products.

8 And then there is a typo at Page 5. It is starting at  
9 Line 12, "On November 9, 2010, Microsoft filed its lawsuit  
10 against Motorola, asserting, among other things, that  
11 Motorola breached its contracts with IEEE and ITU by  
12 contained in these letters." There is something, we don't  
13 know what, omitted there that is needed for that sentence  
14 to work. This looks like it was based in part on  
15 Microsoft's proposed statement, which was, "Asserting,  
16 among other things, that Motorola breached its contracts  
17 with the IEEE and ITU by sending these demand letters." I  
18 don't know what the court was intending there, but there  
19 is an issue with the typo.

20 THE COURT: Mr. Harrigan, I am responsible for  
21 that change. My problem with your proposed language was,  
22 I don't think you have ever contended that sending the  
23 letters was an improper act. I think what you have  
24 contended is the content of the letters.

25 MR. HARRIGAN: I understand that issue. Your

1 Honor, we are not really making any specific request here,  
2 other than there is obviously something left out, and  
3 whatever you intended to put in there needs to be in  
4 there. It just says "by contained in these letters." By  
5 something contained in these letters.

6 THE COURT: Next.

7 MR. HARRIGAN: That's it. That's all we have on  
8 the preliminary instructions, your Honor.

9 THE COURT: Mr. Palumbo, are you or Mr. Price  
10 handling this one?

11 MR. PALUMBO: Ms. Sullivan is handling this one.

12 THE COURT: Ms. Sullivan.

13 MS. SULLIVAN: Good afternoon, your Honor.  
14 Kathleen Sullivan for Motorola.

15 Your Honor, we have no quarrel with anything in your  
16 proposed preliminary instructions whatsoever, with the  
17 exception of one single addition that we proposed in  
18 Docket 864, a letter we filed with you on August 22nd.  
19 That is, we simply urge that on Page 11, at Line 8, that  
20 you add a sentence that states, quoting your earlier  
21 conclusions, "That under Motorola's contracts with the  
22 IEEE and ITU (sic), Motorola did not need to make an  
23 initial offer on RAND terms." That is the sole edit we  
24 propose for the instructions.

25 MR. HARRIGAN: We had a response to that, which we

1 delivered today, I believe, your Honor, which is, if that  
2 sentence goes in, we think it should -- the court's ruling  
3 on that subject should be complete by adding, "But a  
4 blatantly unreasonable offer is a breach of the duty of  
5 good faith and fair dealing, and so a breach of the RAND  
6 contract."

7 THE COURT: All right. Ms. Sullivan, it is your  
8 turn to speak here. Can you give me the cite to where you  
9 said you filed something earlier?

10 MS. SULLIVAN: Yes, your Honor. We filed a letter  
11 on August 22nd, which is Docket 864.

12 THE COURT: Great. That's what I need. And,  
13 Mr. Harrigan, did you docket your letter, or did you just  
14 send it?

15 MR. HARRIGAN: It is Docket 865. It was filed  
16 this morning at 10:00 a.m.

17 THE COURT: All right. Anything else on the  
18 preliminary instructions?

19 MR. HARRIGAN: Not here, your Honor.

20 MS. SULLIVAN: Your Honor, Ms. Sullivan again. We  
21 object to the addition of the language as quoted by  
22 Mr. Harrigan, just because your Honor has not yet defined  
23 the duty of good faith and fair dealing in your  
24 preliminary instruction, and therefore we think it would  
25 be confusing to add what is a breach of good faith and



1 fair dealing duty that you have not yet defined. So we  
2 would object to the inclusion of the sentence with  
3 Mr. Harrigan's additional language.

4 THE COURT: All right.

5 MR. HARRIGAN: Your Honor, we have no objection to  
6 the court's defining the duty in the preliminary  
7 instructions, if that would solve the problem.

8 THE COURT: All right. Counsel, if we make  
9 changes to the preliminary instructions, which is likely,  
10 because I think your comments were constructive, we will  
11 give you a chance to take supplemental exceptions prior to  
12 the jury arriving. So know that you will certainly have  
13 that right.

14 For those of you that don't practice regularly in the  
15 Ninth Circuit, and I'm not suggesting where this will all  
16 end up, the Ninth Circuit has a rather stringent rule that  
17 you need to identify with great particularity what it is  
18 you don't like and why you don't like it, or else they  
19 have a propensity not to consider an exception. Just know  
20 that that is out there. These were very constructive  
21 suggestions, and I thank you for them.

22 Number two on my list is the question -- is I would  
23 like to know your position on the issue of whether the  
24 jury should be allowed to keep the preliminary  
25 instructions. I am authorized to go either way. I

1 normally do not do it, because I view the preliminary  
2 instructions as sort of the operating manual for your new  
3 appliance.

4 It seems to me, and you have heard me say this  
5 repeatedly, we are going to have eight people who don't  
6 know very much about this dispute, and we are asking them  
7 to match wits with you, who have been involved in it in  
8 some cases for years, if not decades. It may be helpful  
9 if they have something to hold onto. I am going to ask  
10 you also about your position on the glossary. That would  
11 be another thing that I would allow them to hold onto.

12 So just to change this up, may I hear Motorola's view  
13 on those two issues?

14 MR. PRICE: Yes, your Honor. This is Bill Price  
15 talking. On the preliminary instructions, I don't think  
16 the jury should keep those. It would tend to give weight  
17 to some instructions over others, such as the instructions  
18 you are going to give at the end of the case. It might  
19 tend to give weight to some facts over others, because  
20 they are going to be hearing facts throughout the trial,  
21 but they are not going to get a list of those facts, even  
22 though admittedly those facts haven't been determined. I  
23 know there is going to be a lot for which there won't be  
24 much dispute. So I think it might skew what the jury is  
25 going to be looking at and listening to during the trial.

1 I would rather they, obviously, be given the instructions  
2 and told what the court is going to tell them, and then  
3 take that into consideration, just as they are going to be  
4 taking into consideration the rest of the things they hear  
5 throughout the trial.

6 With respect to the glossary --

7 THE COURT: Mr. Price, let me ask you this: Do I  
8 cure that if I add the language that I think is in the  
9 model instructions that says, "At the end of this case you  
10 are going to be receiving final instructions, they  
11 control," along with the language that says, "All  
12 instructions are equal," and somehow make it clear that  
13 the final instructions are what controls in this case?

14 MR. PRICE: Your Honor, I don't think so. I think  
15 the reality of the psychology of the folks listening to  
16 the trial is that they tend to kind of lean one way or the  
17 other along the way. The thought of them having something  
18 in their laps that has certain facts and not others, and  
19 certain instructions and not others, that they can look at  
20 for a period of a week, I think it is probably not correct  
21 to assume that they are not going to give that more weight  
22 than the later instructions or the facts as they are  
23 developed throughout the trial, even though you tell them  
24 at the beginning not to do that. I just think that is a  
25 matter of the reality of how people make decisions.

1 THE COURT: All right. Speaking for Microsoft.

2 MR. HARRIGAN: Yes, your Honor. Art Harrigan.

3 Your Honor, as with many things in this case, we disagree.

4 I think the idea of this instruction is that it does

5 provide a guide to an area that is abstruse to most people

6 who have not dabbled in it before, and it would be more

7 useful if they don't just hear it and then it vanishes

8 without a trace for the rest of the trial. And I

9 concur -- I think that the approach to curing it is

10 appropriate.

11 Just to shortcut it, we feel the same way about the

12 glossary. It will be more helpful if they have it in

13 their hands.

14 THE COURT: Mr. Price, did you have any objection  
15 to the glossary?

16 MR. PRICE: We have no objection to that, your  
17 Honor, because I do think it is useful for them to be able  
18 to flip through that so they can see what these acronyms  
19 mean.

20 THE COURT: All right. My third question today  
21 has to do with the jury questionnaire in voir dire. Let  
22 me tell you what I now know from talking to the jury  
23 coordinator and the in-court deputy. These folks  
24 apparently arrive around 8:00, maybe a little bit earlier.  
25 In lieu of the court's standard questionnaire, we are

1 going to give them your questionnaire, and they fill that  
2 out. I have asked them to rearrange their procedures so  
3 they are going to see Raymond Burr, or whoever plays Perry  
4 Mason, in the video "Welcome to Jury Service" after they  
5 have filled out that questionnaire. So you will not have  
6 a long time to look at those jury questionnaires, but you  
7 will have some time, particularly if you have a lot of  
8 last minute matters that you want me to take up.

9 I am told that we send out a jury summons, and they  
10 send back something acknowledging receipt of that. And on  
11 there it asks questions like, "How far away from the  
12 courthouse do you live?" which assists us if we need to  
13 make hotel reservations for them, and, secondly, to  
14 calculate how much they get for their per diem.  
15 Apparently it also asks for their employment. Out of the  
16 35 to 40 jurors, apparently three of them are Microsoft  
17 employees. I have directed that they come in, because it  
18 doesn't seem to me I have the power to strike them until  
19 they say something. So know that out of your jury pool at  
20 least three work for one of the parties. Apparently no  
21 one wrote down that they or their spouse work for  
22 Motorola. Just for your background, know that is what I  
23 know on that subject at this time.

24 Are there any questions about the court's revisions of  
25 the jury questionnaire? I think it is Microsoft's turn to

1 go first.

2 MR. HARRIGAN: No, your Honor, we don't have any  
3 questions about that. I have a question about whether we  
4 need permission to have a jury consultant at counsel  
5 table.

6 THE COURT: You do not need to have permission,  
7 although you do so at your own peril. O.J. Simpson has  
8 made a definite impression on the jurors, and that is one  
9 of the topics that comes up nearly every time I talk to  
10 the jury after the trial.

11 MR. HARRIGAN: Can we agree that there would be no  
12 mention of the presence of such a person?

13 THE COURT: Mr. Price, do you intend to mention  
14 that?

15 MR. PRICE: No, your Honor, we do not intend to  
16 mention that. We may have our own.

17 THE COURT: All right.

18 MR. HARRIGAN: Thank you.

19 MR. PRICE: Your Honor, this is Bill Price. The  
20 only question I have, and maybe we can get some  
21 clarification, is, I know you have said we will have some  
22 time to review the jury questionnaires. Would it be  
23 possible to at least give us a guarantee of like an hour  
24 or so to look at those?

25 THE COURT: The answer for an hour is no, unless

1 you want to take it out of your trial time. As I  
2 mentioned when we started this, jury selection is part of  
3 the hours that are allocated in your trial time. I would  
4 say there is a period of time in which I am going to ask  
5 redundantly some of the questions that are on the  
6 questionnaire, just to highlight for you who it is that  
7 answered affirmatively. So in terms of practical time,  
8 you are going -- depending on if you are allocating the  
9 task to someone else, you will certainly have some time  
10 during which you can examine the questionnaires, and also  
11 make note of who it is that is responding affirmatively to  
12 the questions.

13 MR. PALUMBO: Your Honor, this is Mr. Palumbo. In  
14 terms of our planning for time, how do you allocate the  
15 time that you spend asking questions during jury  
16 selection?

17 THE COURT: It goes 50/50 to the parties. I am  
18 doing that because -- You have a much more complete  
19 questionnaire. Some of those questions I don't think I  
20 need to ask. The first question in the bench book is,  
21 "Have any of you heard about this case?" That one,  
22 periodically, takes a lot of time, because I -- depending  
23 on how many people raise their hand. What I don't want to  
24 have happen is one person say, "Oh, yes, I went and  
25 conducted an internet search on this case and do you know

1 that it has been mentioned in X number," and basically  
2 start to poison the jury pool. The only way that you can  
3 avoid that is to question them at sidebar one by one.

4 My guess is that there has been some publicity, but  
5 not all that many people read the business section, and  
6 not that many people read the Seattle Times anymore. I am  
7 really not very comfortable in predicting what the  
8 response will be to that first question. But that's an  
9 example of something that seems to me better asked by me  
10 than by you, and we will see what the response is going to  
11 be.

12 Any questions about that?

13 MR. HARRIGAN: Not here, your Honor.

14 MR. PRICE: No, your Honor.

15 THE COURT: All right. Let me then turn to one of  
16 the two highlights of today. This is going to address the  
17 question of use of the findings of fact and the  
18 conclusions of law. I have some extensive written remarks  
19 which I'm going to read. And I do so because I recognize  
20 that one of the parties has made this a centerpiece of our  
21 preparation here.

22 Know that I will be filing a written order on this so  
23 that you have a fixed target to shoot against. We hope to  
24 do that early on. When you see that written order, it  
25 will be adding some case cites, and whatever, which I



1 don't intend to do that now, unless I think you need to  
2 know where I am pulling this stuff from.

3 This is in response to the question of what use can  
4 the parties make of the findings of fact and conclusions  
5 of law.

6 The court will now take up how the parties may use the  
7 findings of fact and conclusions of law, which I will  
8 shorthand call FFCL, from the November bench trial in this  
9 case.

10 This question presents a unique legal issue, and it  
11 appears there is limited precedent available to guide the  
12 court's decision.

13 What the court has done, with the consent of the  
14 parties, is take a single claim for breach of contract and  
15 split that trial into two different phases, a bench phase  
16 and a jury phase. As the parties are well aware, the  
17 court issued a 200-plus-page findings of fact and  
18 conclusions of law concerning the bench trial results.

19 Along the way, the court found numerous facts bearing  
20 directly on the ultimate question of a RAND rate and  
21 range. For example, the court made findings related to  
22 the value of Motorola's patents, the extent of their  
23 contribution to the standard, and the value of Microsoft's  
24 products. This obviously was because the court could not  
25 set a RAND rate or range in a vacuum; it was necessary to

1 understand Motorola's patents in context and to hear  
2 testimony from experts on the value of those patents.

3 The individual findings of fact were the building  
4 blocks of the court's ultimate RAND determination, and  
5 without those building blocks the final determination  
6 could not exist.

7 The question now before the court is how the findings  
8 of fact and conclusions of law should be used in the  
9 upcoming jury phase of the trial. The court has already  
10 ruled, in deciding motions in limine, that the jury may  
11 hear the RAND rate and range. This is not in dispute at  
12 this point. The question now is whether the jury will be  
13 permitted to hear the individual factual findings on which  
14 the RAND rate and range are predicated; in other words,  
15 whether the jury will be permitted to hear the building  
16 blocks that made up the court's ultimate RAND  
17 determination.

18 There are two overriding concerns with respect to this  
19 issue. First, the court must protect the parties' right  
20 to a jury trial where that right has been preserved. It  
21 is clear that it would violate the Seventh Amendment if  
22 the court, through its Findings and Conclusions, precluded  
23 the jury from deciding factual questions on which the  
24 parties preserve their jury trial rights.

25 However, it is equally clear that it does not violate

1 the Seventh Amendment for the court to decide factual  
2 questions, and thus preclude the jury from deciding those  
3 questions, where the parties have waived their right to a  
4 jury trial.

5 This leads to the second major area of concern on this  
6 issue: holding the parties to the commitments they have  
7 made in this case and not allowing them to negate their  
8 prior representations to the court.

9 The parties charted a course with this case that  
10 included waiving their jury trial rights on certain  
11 issues. It now appears that Motorola seeks to recant this  
12 prior agreement, having not achieved its desired result it  
13 hoped for in the first phase. The court must be mindful  
14 not to allow the parties to re-litigate the issues that  
15 they agreed to have the court decide, and the court did  
16 decide, simply because a party does not like the court's  
17 findings.

18 With these concerns in mind, the court now turns to  
19 the central issue to be decided. There is no dispute that  
20 the parties have waived some of their jury trial rights in  
21 this case; thus, the critical issue is what is the scope  
22 of the parties' waiver? This question can be answered in  
23 one of two ways. First, one can argue that the parties'  
24 waiver of their jury trial rights was narrow, in  
25 accordance with how waivers of constitutional rights are

1 usually construed, and the parties only agreed to have the  
2 court decide two issues, a specific RAND rate and a  
3 specific RAND range for Motorola's standards-essential  
4 patents. Motorola now takes this position.

5 Second, one could argue that the parties' waiver, even  
6 narrowly construed, necessarily covered not only a RAND  
7 rate and range, but also all of the factual predicates  
8 necessary to determining a RAND rate and range. Microsoft  
9 takes this position.

10 In the unique context of this case, and given the  
11 parties' actions in the course of the litigation, the  
12 court finds that the first proposition is unsupportable.  
13 There are several reasons why this is true. First, the  
14 parties' waiver of its jury trial rights does not seek to  
15 strictly limit the waiver to only two narrow findings, and  
16 does not attempt to preserve the parties' jury trial  
17 rights with respect to the RAND issues decided in the  
18 bench trial. In short, there is no indication that the  
19 parties sought to restrict their jury trial waiver to only  
20 a RAND rate and range to be given to the jury with no  
21 factual context.

22 The parties' actions throughout this litigation  
23 suggests that Motorola's position is not the correct one.  
24 Motorola fully participated in the bench trial. Motorola  
25 presented evidence on and vigorously disputed all of the

1 factual findings that it now claims should be kept from  
2 the jury. Motorola presented extensive evidence on the  
3 importance of the H.264 and 802.11 patent portfolios to  
4 the respective standards and to Microsoft's products.  
5 Additionally, Motorola presented evidence of the  
6 importance of the standards to Microsoft's products.

7 Further, Motorola suggested, and the court adopted, a  
8 modified Georgia-Pacific analysis as the framework for the  
9 court's RAND determination, which placed at issue nearly  
10 all of the facts which Motorola now wants to keep from the  
11 jury.

12 At no point did Motorola attempt to prevent the court  
13 from making the findings on the issue it now believes  
14 violates the Seventh Amendment. In fact, Motorola  
15 submitted 100 pages of proposed findings of fact and  
16 conclusions of law on these issues, urging the court to  
17 decide the very facts that it now seeks to exclude. At no  
18 point did Motorola qualify those proposed findings or  
19 attempt to preserve its rights to a jury trial with  
20 respect to the facts it proposed to the court. All of  
21 this behavior shows the court that Motorola's waiver is  
22 not only of the RAND rate and range, but also of the  
23 factual predicates necessary to determine that rate and  
24 range.

25 Second, the parties' reasons for agreeing to a bench

1 trial in the first place favor Microsoft's position. The  
2 parties agreed to hold a bench trial in part because this  
3 case presents a lot of complicated technical issues. The  
4 point of having a bench trial was to let the court sort  
5 through Motorola's patents to determine what they were  
6 worth and to spare the jury that task. It is not that the  
7 bench phase and the jury phase were on separate issues.  
8 There can be no doubt that the findings of fact made in  
9 the bench trial were relevant to the ultimate questions of  
10 breach of contract. Instead, the parties simply decided  
11 that the judge, not the jury, could make the findings  
12 because it could prove difficult for a jury. Indeed, the  
13 court sympathizes with this view, having spent a  
14 substantial amount of time on the FFCL.

15 The whole effort to spare the jury a difficult task  
16 would be wasted if Motorola were now permitted to reargue  
17 the court's findings at this point. The jury would be  
18 asked to determine anew the facts already found.  
19 Likewise, the effort would be wasted if the parties were  
20 required to present evidence again to prove facts that  
21 have already been proved once. The court cannot conclude  
22 that this was the intent of the parties in waiving their  
23 jury trial rights, nor does this viewpoint make any sense  
24 from the context of this litigation.

25 And to be clear, this is not to suggest that concerns

1 about conserving resources somehow trumps the Seventh  
2 Amendment. They do not. It is merely to demonstrate the  
3 reasons why the parties agreed to waive the jury trial and  
4 why the court should construe the waiver in harmony with  
5 those reasons.

6 Third, during the bench trial the court took great  
7 care to avoid deciding unnecessary factual issues in the  
8 bench phase and directly implicated issues to be decided  
9 in the jury phase. When such issues arose in the RAND  
10 trial, and they appeared to wander into the jury's  
11 territory, the court did not decide those issues.  
12 Further, in crafting our findings and conclusions the  
13 court was mindful not to include anything that would  
14 infringe on Motorola's right to a jury trial on the breach  
15 of contract issue.

16 Fourth, there is another important reason to reject  
17 Motorola's position. Motorola's position is grounded in  
18 the notion that they should be allowed to reargue the  
19 court's factual findings to the jury, even though it  
20 cannot re-argue the final RAND rate and range. This  
21 cannot be. As stated above, the court's individual  
22 findings of fact are the building blocks on the RAND rate  
23 and range. If each of these building blocks could be  
24 challenged in front of the jury, Motorola would in effect  
25 be allowed a second bite at the apple on the RAND rate and

1 range. It is impossible to successfully challenge the  
2 individual factual findings without undermining the  
3 court's ultimate RAND conclusions. Allowing such  
4 challenges would permit Motorola to have it both ways.  
5 Motorola would get to argue the value of its patents to  
6 the judge, and then if the judge disagreed with them,  
7 Motorola could simply ask the jury to reach a different  
8 result. That is not what the parties agreed to. The RAND  
9 rate and range have been decided. The parties consented  
10 to a bench trial, and they got one. The court will now  
11 hold the parties to their commitments.

12 Finally, the parties sought to have the court  
13 determine, broadly, the RAND portion of the case, and to  
14 have the jury determine the breach of contract portion.  
15 Quoting Mr. Harrigan: "In a nutshell, your Honor, the  
16 parties agree that there is no jury involved, there is no  
17 jury requirement with respect to the court's determination  
18 of what is RAND, and the contract and so forth; and  
19 disagree with respect to whether a jury would be required  
20 to deal with the breach of contract part of the case."

21 The parties agreed to have the court determine, quote,  
22 "all material terms of the RAND contract," unquote.  
23 Quoting Mr. Palumbo: "That's right, your Honor. Our  
24 agreement is the court would decide all of the material  
25 terms of the RAND license. And we currently have a



1 disagreement with respect to whether the breach of  
2 contract action should be tried by the court or by the  
3 jury."

4 Further, the court has been clear throughout this case  
5 that the purpose of the bench trial was to determine a  
6 RAND rate for use by the jury in the second phase of the  
7 trial. Quoting the court: "It seems to me what you're  
8 really asking is what's going to happen in November. So  
9 let me tell you what I think is going to happen in  
10 November, and then I'm happy to hear from you. In  
11 November, I expect us to try in a bench trial the RAND  
12 terms for patents covered by ITU's standard H.264, and the  
13 patents pertaining to IEEE 802.11. I understand from the  
14 complaint, and from Motorola's offer letters of October  
15 21, 2010 and October 29, 2010, that there are patents at  
16 issue in what we call the 1823 litigation. That mostly is  
17 a question of the royalty rate since that is what is  
18 covered by your letters. In regards to the breach of  
19 contract claim, that will not be tried at the November  
20 trial date. As I have explained to you previously, my  
21 reasons for that is the breach of contract, as Motorola  
22 has admitted, exists in relation to the RAND rate. I  
23 think Mr. Jenner's example was a million-dollar royalty  
24 rate for one patent and the RAND rate turned out to be  
25 15¢. Since I don't know what the RAND terms are yet, it

1 seems to me I can't deal with a breach of contract until  
2 RAND is determined."

3 Indeed, Motorola preserved its jury trial right only  
4 with respect to the breach of the issue of the duty of  
5 good faith. Mr. Palumbo: "In answer to your question, we  
6 have decided not to waive the jury trial on the breach of  
7 the duty of good faith issue, and with respect to that  
8 issue, we think -- we do agree that it is a triable issue  
9 which the jury can determine. In other words, did  
10 Motorola accord to its obligation to negotiate the  
11 contract in good faith? We may have issues with respect  
12 to whether the court can instruct the jury as to the  
13 proper RAND rate, but we agree that it is a jury question  
14 as to whether Motorola has conformed to its obligation to  
15 negotiate a RAND license in good faith. So you would have  
16 to decide, if you go forward, to actually set the terms of  
17 the RAND license, you would need to decide only which  
18 terms are material, and then what each of those material  
19 terms would be."

20 The parties understood that the project of the court  
21 would be to determine what the RAND terms are. Quoting  
22 the court: "I will tell you that the operating assumption  
23 of the court as to right now is that Motorola, when it  
24 contracts for industry standard patent status, obligated  
25 itself to make an offer on RAND terms for a license to the

1 patents that are covered, the H.264 and 802.11 patents;  
2 that Microsoft has accepted that offer on RAND terms; and  
3 what the court is doing is determining what those RAND  
4 terms are."

5 Thus, the parties' waiver of their jury trial rights  
6 does not support Motorola's position that it waived its  
7 jury trial rights exclusively with respect to the RAND  
8 rate and range and none of the other facts found in the  
9 bench trial.

10 Accordingly, the court concludes that the scope of the  
11 parties' jury trial waiver, even narrowly construed, must  
12 include not only the RAND rate and range, but also all of  
13 the factual predicates contained in the findings of fact  
14 and conclusions of law that were necessary to determine  
15 that rate and range. It will not violate Motorola's  
16 Seventh Amendment right to allow the jury to hear the  
17 court's factual findings.

18 The remaining question is how, from a mechanical  
19 standpoint, the parties will be permitted to make use of  
20 the findings and conclusions. This is subject to varying  
21 approaches, but the court will now establish several  
22 principles to guide the parties:

23 First, that the FFCLs will not be admitted in their  
24 entirety.

25 Second, the court will not specifically instruct the

1 jury on a particular finding of fact, with the exception  
2 of the RAND rate and range. Instead, the findings must  
3 come in through witness testimony.

4 Third, conclusions of law in the court's orders may be  
5 freely used and referred to.

6 Fourth, the use of the court's findings are subject to  
7 Federal Rules of Evidence 401, 402 and 403. In  
8 particular, the court is unwilling to allow the parties to  
9 go into excessive detail about the specific nonessential  
10 issues explored in the previous trial, and will exclude  
11 attempts to do so under 403.

12 Fifth, if a witness testifies on direct examination  
13 concerning a subject covered by the findings and  
14 conclusions, and the underlying finding is challenged on  
15 cross, the court will not permit evidence in an effort to  
16 re-litigate that issue if the court has already decided  
17 it.

18 Sixth, the parties should minimize the use of phrases  
19 like, "Judge Robart says," and "the court has ruled." The  
20 parties should also not attempt to improperly use the  
21 imprimatur of the court to imply that the jury should  
22 reach a certain result or view the evidence in a certain  
23 way.

24 Seventh, witnesses may not simply read from the FFCL.  
25 Instead, they must testify to the underlying facts, and

1 may, if necessary, use the court's finding as the basis  
2 for those facts. As a corollary, counsel may not display  
3 excerpts from the findings of fact and conclusions of law  
4 to the jury using PowerPoint or any other display  
5 mechanism. If a witness testifies to a fact contrary to  
6 something contained in the findings and conclusions, the  
7 opposing party may use the findings and conclusions to  
8 impeach that witness.

9 Finally, the court will obviously entertain legitimate  
10 objections to the use of the court's findings and  
11 conclusions during the trial, and will address those  
12 issues on a case-by-case basis. As I said, we are going  
13 to be confirming that in a written order, which will be  
14 available to you.

15 Turning then to -- It seemed helpful to have an  
16 example to guide you. Microsoft filed at Docket 861  
17 excerpts of the court's orders upon which Microsoft  
18 intends to rely in Microsoft's opening statements. If you  
19 look on Page 4 of that order, at Paragraph 289, to what  
20 the court would believe to be acceptable, would be, taking  
21 the language out of the Findings of Fact and Conclusions  
22 of Law, 289: "Motorola's H.264 SEPS provide only minor  
23 importance to the overall functionality of Microsoft's  
24 Windows products. Windows, first and foremost, is an  
25 operating system designed to permit various applications

1 to operate via a user. The Windows operating system has  
2 vast functionality completely unrelated to any video  
3 viewing. Only when a Microsoft Windows user chooses to  
4 play interlaced video would Windows employ the  
5 functionality of Motorola's H.264, which in turn only  
6 provide a portion of the coding tools necessary to view  
7 the interlaced video. Moreover, the interlaced video  
8 would still play without Motorola's H.264, it might just  
9 be five to eight percent slower."

10 Contrast that with Findings of Fact 533, which would  
11 be, "The court concludes that Motorola's H.264 portfolio  
12 only constitutes a sliver of the overall technology  
13 incorporated in the H.264 standard." The remainder of  
14 that finding and conclusion has to do with Telenor Group.  
15 And it talks about what they did. It says, "Telenor  
16 decided not to seek patents on its contributions, and  
17 notified JVT of its decision."

18 That, in the eyes of the court, would not be an  
19 appropriate use of the findings and conclusions, as it  
20 does not have anything to do with the overall question of  
21 breach of contract.

22 So, I offer those as examples to help you with how to  
23 approach this issue.

24 You all created a controversy, as exemplified in  
25 Mr. Harrigan's August 20 letter dealing with the

1 defendant's revised proposed preliminary instructions. It  
2 says, "Motorola's submission does not contain stipulated  
3 facts." The court believes that the only stipulated facts  
4 in this matter are found in your pretrial order on Page 5.  
5 It is entitled "admitted facts." It says, "facts to which  
6 all the parties agree." Short of that, I see nothing that  
7 each of you has submitted that says both of you agree as  
8 to anything. So know that is our operating assumption as  
9 to where you are in terms of stipulated facts.

10 That was a long section of me talking. Mr. Price, I  
11 think you are up first on this one. Any questions in  
12 regards to the court's ruling?

13 MR. PRICE: No questions, your Honor. We  
14 obviously look forward to (phone malfunction) --

15 THE COURT: I'm sorry. You cut out on me there.

16 MR. PRICE: I'm sorry. We have no questions, your  
17 Honor. We obviously look forward to seeing it in writing  
18 so we can give it the attention it deserves.

19 THE COURT: Thank you. Mr. Harrigan.

20 MR. HARRIGAN: Yes, your Honor. I have a couple  
21 of questions. First of all, I just want to make sure I  
22 understood your examples. So with regard to 533, what I  
23 believe you said was the first sentence about the "sliver"  
24 is appropriate, and the rest of that is not?

25 THE COURT: A witness will be able to testify to

1 it. You don't get to put it up as a PowerPoint  
2 presentation.

3 MR. HARRIGAN: I understand. Let me just give you  
4 an example. Maybe this will help us to make sure we  
5 understand. If we put Mr. Glanz on, the approach I was  
6 thinking that would be efficient is, rather than have him  
7 reiterate everything he said in an hour in the last trial,  
8 to use the court's findings with regard to what happened  
9 with MPEG LA and Motorola's approval of rates, and so  
10 forth, and then have him simply give a little context to  
11 it, with the idea that we could cover this in 20 minutes  
12 instead of 45 minutes to an hour. And I was contemplating  
13 that I would read to him during his testimony maybe five  
14 of the court's findings on the subject of MPEG LA, and he  
15 would put them in a little bit larger context for the  
16 jury. You said that the witness could testify from the  
17 findings, but I'm not sure whether the lawyers are allowed  
18 to read them into the record as part of the witness'  
19 testimony. Is it that the witness should refer to the  
20 findings and quote from them, and then explain some of the  
21 context? In other words -- I am babbling a little bit  
22 here, but I am just trying to figure out what the right  
23 approach is.

24 THE COURT: You're not going to be able to read  
25 them to him and say, "Is that a finding?" That is not a



1 proper bit of evidence. He is not going to be permitted  
2 to say, the court found in finding such and such, and then  
3 recite what that is. If he is competent to state the  
4 area, he can say, this is MPEG 2, this is what happened in  
5 MPEG 2, this was the ultimate conclusion of MPEG 2. If he  
6 is assaulted on cross-examination, and they say that can't  
7 possibly be right, he would be permitted to say, you know,  
8 the court found in its prior order what I have just  
9 testified to. But you have to put these findings and  
10 conclusions into evidentiary form. You don't simply get  
11 to put them up there under limited or no context, because  
12 at that point you are converting the court into a witness,  
13 which I don't believe is proper under the circumstances.

14 MR. HARRIGAN: Would Mr. Glanz be able to use the  
15 court's findings to -- In other words, the thing I am  
16 concerned about is that it sounds as though we would be in  
17 effect re-presenting the evidence that underlies the  
18 court's findings, which I thought I understood from your  
19 other remarks is something that you want to avoid. And so  
20 it is unclear to me how we get the finding into evidence  
21 if the witness can't read it, we can't read it and we  
22 can't put it up on a screen. How do we use the findings  
23 to get this trial done in the amount of time that we have  
24 available?

25 THE COURT: That's why they are paying you the big

1       bucks, to figure that out. He is not going to get to say,  
2       my testimony is the court found at Finding 581 such and  
3       such. He can say the substance of the findings, you know,  
4       what happened in MPEG.

5               MR. HARRIGAN: I think I get it. I take it the  
6       jury is never going to actually see or hear these  
7       findings; is that right?

8               THE COURT: They are going to hear and see the  
9       finding on rates and range, and they are going to hear  
10      testimony from witnesses; and if the witness is  
11      cross-examined in regards to the accuracy of that  
12      testimony, they are going to be able to ultimately say,  
13      this was previously determined by the court and that's why  
14      I believe this is what happened.

15              There seems to be some stunned silence. Does that  
16      mean that I can move on?

17              MR. HARRIGAN: I guess, your Honor, we are a  
18      little bit puzzled by how we are going to get this done in  
19      the available time. I guess we will just have to figure  
20      that out. Assuming that the court was going to adhere to  
21      your original view, that the findings were verities, and  
22      the jury in effect wasn't going to have to revisit them,  
23      our operating assumption in getting ready for trial was  
24      that we didn't have to re-prove the findings, and we could  
25      in effect use them in some form. But it sounds like you

1 have excluded all of the forms in which we thought we  
2 potentially could use them. I am just a little puzzled  
3 about how we avoid retrying the case.

4 THE COURT: I would urge you to retry the case on  
5 the breach of contract question and not on the RAND rate  
6 question. That's the original distinction that we had. I  
7 have read your -- the excerpts that were going to be used  
8 as part of the opening statement, and I simply don't think  
9 that many of them have anything to do with the breach of  
10 contract.

11 MR. HARRIGAN: Right. We may have been  
12 overinclusive. But, for example, the issue of whether  
13 Motorola's patents are a sliver of either of the two  
14 standards, obviously as it bears on the good faith issue  
15 it bears on whether Motorola was frustrating the purpose  
16 of RAND because of stacking and so forth. I mean, we  
17 would have to call an expert from the prior trial to  
18 testify that they were a sliver. And we were of the  
19 understanding that the court, having gone through an  
20 enormous amount of analysis to reach that one-sentence  
21 conclusion, that we would be able to present that finding  
22 and not go back through the analysis that created it.

23 THE COURT: I don't want you to go back through  
24 the analysis that created it. You are going to be able to  
25 allow your witnesses to testify that this is a very large

1 standard, it has a lot of stuff in it, it went through an  
2 extended and complicated process to be created, and that  
3 Motorola's patents are but a sliver of it. That's what  
4 the court found, and that's what I understand you are  
5 presenting testimony about.

6 Are we going to go back and talk about the particular  
7 value of interlaced video? No. We are trying a breach of  
8 contract case, we are not retrying the RAND rate case.

9 MR. HARRIGAN: I think I get it.

10 THE COURT: Good. Let me move on to Marvell then.  
11 Once again, this is going to be one where we are going to  
12 give you a written order. But much to the disappointment  
13 of the blogosphere, I am not going to wade into the  
14 question of exhaustion, particularly in this trial.

15 Once again, this is one where the court will give you  
16 a written order so that you know my thinking on this.

17 The law is well established that an authorized sale of  
18 a patent product places that product beyond the reach of  
19 the patents. The patent owner's rights with respect to  
20 the product end with its sale, and a purchaser of such  
21 products may use or resell the product free of the patent.  
22 This longstanding principle applies similarly to a sale of  
23 a patented product manufactured by a licensee acting  
24 within the scope of its license.

25 I am omitting the case cites that go along with this

1     since I'm sure you all know them by heart.

2             In Honeywell, over the dissent of Judge Mayer, the  
3     Federal Circuit reversed a finding that patent rights were  
4     exhausted to the accused systems sold by the plaintiff at  
5     a time before the plaintiff had merged with the holder of  
6     the patent, the majority ruling that there was no  
7     authorized first sale. And then it has a quote about,  
8     "For the first sale doctrine to apply, there must be an  
9     authorized first sale."

10            In other words, courts examining the question of  
11    exhaustion look to the license agreement, typically  
12    between the patentee and licensee, to determine whether a  
13    sale of a licensed product was authorized by that  
14    agreement. For example, in Quanta, cited by the parties  
15    in their briefing on the exhaustion issue, the court  
16    examined the scope of the license between Intel and LGE.  
17    The court found that, "Nothing in the license agreement  
18    restricts Intel's right to sell its microprocessors and  
19    chipset to purchasers who intend to combine them with  
20    non-Intel parts. It broadly permits Intel to make, use,  
21    or sell products free of LGE's patent claims." The Quanta  
22    court then found: "Because Intel was authorized to sell  
23    its products to Quanta, the doctrine of patent exhaustion  
24    prevents LGE from further asserting its patent rights with  
25    respect to the patents substantially embodied by those

1 products."

2 As another example, in *Cook, Inc. versus Boston*  
3 *Scientific*, the court examined license agreements between  
4 the patentee and the licensee, and determined that the  
5 doctrine of exhaustion did not apply because the license  
6 agreement prohibited the downstream assignment to a third  
7 party, such that the third party could not make the  
8 requisite first sale of the patented product." See also  
9 *Intel versus ULSI System Technology*.

10 In that case it is examining the specifics of the  
11 license agreement between Intel and Hewlett Packard to  
12 determine if HP's sale of the 'C87 coprocessors were  
13 insulated by the doctrine of exhaustion from Intel's claim  
14 of infringement because they were sold by ULSI to HP,  
15 which was authorized to do so under the license agreement  
16 with Intel.

17 Here, Microsoft asked the court to set forth a jury  
18 instruction that a presumed license agreement between  
19 Motorola and Marvell for Motorola's 802.11 SEPs would act  
20 to exhaust Motorola's patent rights against Microsoft.  
21 Motorola states, citing *Quanta*, "that a RAND license  
22 agreement granted by Motorola to Marvell would broadly  
23 permit Marvell to make, use or sell products free from  
24 Motorola's patent claims, because Motorola's RAND license  
25 agreement bars it from imposing any conditions limiting

1     Marvell's authority to sell products substantially  
2     embodying the patent."

3             First, as explained above, Quanta examined a specific  
4     license agreement and determined that the license  
5     agreement between Intel and LGE permitted the sale of  
6     patented products. The holding of Quanta was specific to  
7     the license agreement at issue in that case.

8             Second, Quanta does not in any way deal with the RAND  
9     commitment, as Microsoft suggests.

10            The bottom line here is that each license agreement is  
11     specific, and whether or not the downstream sale is  
12     authorized by the license agreement between the patentee  
13     and the licensee is dispositive of authorization and thus  
14     whether the exhaustion doctrine applies. Here, we do not  
15     have a Motorola-Marvell license agreement. Although it is  
16     likely, we do not know if Marvell is a third-party  
17     beneficiary from Motorola's RAND commitment. Microsoft is  
18     asking the court to make a contractual determination of a  
19     license agreement that does not exist. The court will not  
20     issue such an advisory opinion.

21            Alternatively, Microsoft would ask the court to set  
22     forth a rule of law that a RAND commitment requires  
23     licenses free of downstream restrictions. The court  
24     cannot do that in this case because there is simply an  
25     insufficient record. The requirements of the RAND

1 commitment on licensing agreements is an open question at  
2 this point, and the numerous questions of law, some of  
3 which have been briefed, some not, do not need to be  
4 resolved in this case; for instance, is a defensive  
5 suspension clause proper in a RAND license; what is the  
6 proper scope of a defensive suspension clause; does the  
7 RAND obligation require RAND licenses that will cover all  
8 downstream customers, or may restrictions be imposed on  
9 sales.

10 The Marvell issue has been in this case for a while,  
11 but there is no briefing that answers the open question of  
12 the RAND commitment's legal operation in potential  
13 licensing agreements between a SEP holder and licensees.  
14 Thus, the court cannot issue a jury instruction construing  
15 the law regarding a hypothetical Motorola-Marvell license  
16 and the effect of this hypothetical license on Motorola's  
17 ability to seek royalties from Microsoft.

18 The result is that Microsoft cannot make this argument  
19 to the jury, that had Motorola given the license to  
20 Marvell, Motorola could no longer seek royalties from  
21 Microsoft.

22 This does not mean, however, that Microsoft cannot  
23 introduce evidence regarding Motorola's conduct vis-a-vis  
24 Marvell, because such evidence is still relevant to  
25 Motorola's good faith or bad faith. Microsoft simply may



1 not connect the dots and state a Motorola-Marvell license  
2 would preclude Motorola from seeking royalties from  
3 Microsoft, because such an argument turns on legal grounds  
4 which do not exist.

5 This will be greatly disappointing to all of those law  
6 firms who have been publishing things in the last couple  
7 of weeks, saying, oh, boy, we are looking forward to  
8 having a resolution of these issues. I don't see how I  
9 can do that, given the state of the record here, when we  
10 do not have a license, and therefore we don't know the  
11 terms of it.

12 Mr. Harrigan, I think you are first this time. Any  
13 question about the court's ruling on Marvell?

14 MR. HARRIGAN: No, your Honor.

15 THE COURT: Mr. Price?

16 MR. PRICE: No questions, your Honor.

17 THE COURT: All right. Moving right along then.  
18 The court received either a phone call or an e-mail, I'm  
19 not sure which, late last night, saying: Here are some  
20 miscellaneous items. We have covered the glossary. Will  
21 the court approve an agreement of calling witnesses only  
22 once?

23 The answer is yes.

24 And, finally, there would be some miscellaneous  
25 matters that might need to be sealed, and the example

1 given was attorneys' fees. Be mindful of the Ninth  
2 Circuit's presumption against sealing anything other than  
3 a trade secret. I don't think that attorneys' fees rates  
4 are probably a trade secret. I will keep an open mind on  
5 it, but if I were asked to rule on that at the present  
6 time, I would say we would not be sealing that.

7 Motorola asked: May we use video depositions in  
8 openings?

9 I have made rulings on all of your objections. The  
10 other side needs to know in advance what you are going to  
11 use, but I guess I have permitted videotaped deposition  
12 excerpts to be used.

13 And then there were some questions about time  
14 allotment. If I come out and say an issue has arisen, and  
15 I ask for comments from both of you, that usually gets  
16 allocated 50/50. If a party raises an issue, and they are  
17 the only ones that argue, it gets charged to them. I  
18 don't divide that 50/50. I will go by the actual time  
19 that each side uses.

20 Are there any other miscellaneous matters that you  
21 would like to take up today?

22 MR. HARRIGAN: Your Honor, I have one question,  
23 which I think we all reached an understanding about this  
24 subject at our last meeting with the court. But  
25 specifically with reference to Mr. Dailey, a Motorola

1 witness who testified at the last trial, we plan to call  
2 Mr. Dailey in our case. We understand that we had agreed  
3 that that meant that Motorola would do their full direct  
4 for their case during our case; and to the extent there is  
5 an issue regarding rebuttal, any recalling of Mr. Dailey  
6 for rebuttal would be strictly limited to new material  
7 that came up after he testified in our case. I just want  
8 to make sure we are all on the same page on that.

9 THE COURT: That's what I understood the agreement  
10 was. Mr. Price? Ms. Sullivan?

11 MR. PRICE: Your Honor, this is Bill Price  
12 talking. Yes, if Mr. Dailey is called in plaintiff's  
13 case, we would do our full examination. Obviously we  
14 would not recall him unless we made some showing that  
15 something happened that could not have been reasonably  
16 anticipated, like if a witness comes forward and says,  
17 Mr. Dailey said he had voodoo dolls of Microsoft  
18 executives, we think we should be able to come back and  
19 say, no, he didn't.

20 One thing I wanted to alert you to that just occurred  
21 to me, your Honor, that given your ruling today,  
22 particularly on the use of the court's order, we may want  
23 to have a few moments to reexamine whether we are going to  
24 have Mr. Dailey here for the first part of the case. We  
25 just need to think about that now that I have a clear

1 understanding of how your order is going to be used in the  
2 examination of witnesses.

3 THE COURT: Where does Mr. Dailey reside?

4 MR. PRICE: He is in Chicago, your Honor.

5 THE COURT: Here is my concern: I don't want  
6 Microsoft to be disadvantaged and I don't want Motorola to  
7 be disadvantaged. If the assumption has been that he was  
8 going to be here and therefore they didn't need to  
9 designate his testimony or whatever, and now all of a  
10 sudden you are saying, well, we might not have him appear  
11 at the start, that's not going to fly well with me. You  
12 need to live up to those commitments. On the other hand,  
13 I applaud both of you. Juries really don't get why  
14 witnesses are called and recalled. They find that very  
15 confusing.

16 MR. PRICE: Your Honor, I understand exactly what  
17 you are saying. Microsoft has already designated  
18 Mr. Dailey's deposition testimony. The question is  
19 whether or not we don't have to deal with that because he  
20 is going to be live. And we represented to the court that  
21 in fact was what we were going to do, is have him  
22 available live. I am just saying, given the court's  
23 order, I just need time to think about whether or not we  
24 still want to do that, and whether or not -- Of course,  
25 we would have to have the court's permission to change

1 that. I understand that. But Microsoft has already  
2 designated deposition testimony of him in case he was not  
3 going to be available.

4 MR. PRITIKIN: Your Honor, this is David Pritikin.  
5 We were told last week, I think, that Mr. Dailey was going  
6 to be their corporate representative, meaning that he  
7 would be present through the entire trial. It was  
8 Motorola that had asked that we call him in our case so  
9 that we could avoid having to call him twice. There are  
10 various pieces of testimony he has given before, some of  
11 it is the trial transcript from the trial last fall, some  
12 of it is the trial transcript from the International Trade  
13 Commission. There are no videos of this. What it would  
14 entail, if they decide he is not going to be the corporate  
15 representative now, and they are going to absent him from  
16 the jurisdiction, we would have to actually read all this  
17 stuff to the jury, and then I guess they are going to  
18 bring him in later in the week to testify in their case.  
19 It seems to me, based on where we are now, they ought to  
20 just bring him in and let us question him as we intended  
21 to do in our case.

22 THE COURT: Have I reviewed the objections to any  
23 of this material?

24 MR. HARRIGAN: Your Honor, I believe you have. I  
25 believe you have. I want to double-check that. But

1       that's my recollection.

2               MR. PRICE:   Your Honor has ruled on those  
3       designations.

4               THE COURT:   Mr. Price, you can think about it, but  
5       if your answer is anything other than he is showing up, I  
6       may well order him to appear.  It seems to me we are kind  
7       of down the road here a bit and people have relied on  
8       prior representations.  It is not to suggest anyone did  
9       anything wrong, but people make trial plans, and I think  
10      that we want to try and honor those.

11              MR. PRICE:   I understand, your Honor.  I'm sorry.  
12      I didn't mean to interrupt you.  I understand that.  I  
13      would make my position clear by the end of the day, in  
14      case we do need to discuss the issue further.

15              THE COURT:   All right.  That may be a potential  
16      matter for Monday morning, but tell him to keep a bag  
17      packed.

18              MR. PRICE:   I will.

19              THE COURT:   Counsel, anything else at this time?

20              MR. HARRIGAN:  Not here, your Honor.

21              MR. PRICE:   Not here, your Honor.

22              MR. PALUMBO:  Thank you.

23              THE COURT:   Bye-bye.

24                              (Adjourned.)

25

CERTIFICATE

I, Barry L. Fanning, Official Court Reporter, do hereby  
certify that the foregoing transcript is true and correct.

S/Barry L. Fanning

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Barry L. Fanning